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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 689

CHARLES C. CARLSON, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (R. 204-246)¹ are not yet reported. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 276-277) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit,

¹ In this brief references to the printed record appear as (R. —), and references to the original administrative record filed with this Court appear as (Tr. —).

affirming the decision of the Federal Communications Commission, was entered on February 14, 1949 (R. 277). The petition for a writ of certiorari was filed on April 1, 1949. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission improperly denied petitioner a full and fair hearing on his application for renewal of his radio broadcasting station license.

2. Whether the Federal Communications Commission improperly denied petitioner's application for renewal of his station license on the basis of findings and conclusions, made on the hearing record, that petitioner had demonstrated his lack of qualifications to continue as a radio station licensee by continued and persistent violations of the Commission's Rules and Regulations and Standards of Good Engineering Practice and by continued unsatisfactory operation of his station.

STATUTE AND REGULATIONS INVOLVED

Certain sections of the Communications Act of 1934 (48 Stat. 1064), and certain of the Rules and Regulations of the Federal Communications Commission, have been set out in the Petition and Appendix attached thereto. Sections 307 (a) and 309 (a) of the Communications Act are reprinted in the Appendix, *infra*, p. 18.

STATEMENT

Petitioner Charles C. Carlson is the licensee of radio broadcasting station WJBW, New Orleans, Louisiana, operating on 1230 kilocycles with 250 watts power. On August 14, 1942, Carlson filed an application for renewal of license of Station WJBW (R. 9-11). On August 10, 1943, the Commission, being unable to determine that a grant of the application would be in the public interest, designated the application for hearing, in accordance with the provisions of Section 309 (a) of the Communications Act, upon issues relating to official notices sent to the licensee of Station WJBW between the dates of February 9, 1940, and December 17, 1943, inclusive, for violations of the Commission's Rules and Regulations and Standards of good Engineering Practices, and covering 92 separate citations of various types of violations (R. 11-18).² A hearing was held on his application on November 8, 9, and 10, 1943, in New Orleans, Louisiana, and on December 31, 1943, in Washington, D. C.

On March 27, 1944, Mr. Carlson filed his proposed findings of facts and conclusions of law with the Commission (Tr. 587-595). In these

² The cited violations related, in the main, to (a) inadequate maintenance or improper operation of transmitting equipment, and other matters concerning the station's technical operation; (b) violation of wartime security requirements; and (c) improper keeping of or failure to keep operating logs, and improper announcement of programs (R. 204-205).

proposed findings he admitted that most of the violations charged in the Commission's notice of hearing had occurred (Tr. 589-590) but argued that since the transmitter in use at the station was in keeping with the Commission's requirements (Tr. 590-591) and petitioner had now engaged a competent engineer and general manager (Tr. 592-594), he was now in a position to operate his station in the public interest and in accordance with the Commission's Rules and Regulations. Petitioner stated further that "in view of some proven negligent violations of the Commission's Rules and Regulations in the past, however, this applicant should be required to prove that radio station WJBW has shown marked improvement and that there is evidence that it is now being operated in accordance with all of the Rules and Regulations of the Commission" (Tr. 594). The proposed findings recommended, therefore, that further inspections of the station be ordered at six-month intervals to determine whether it was now being operated "in strict accordance" with the Commission's Rules and Standards and that if these inspections so indicated, petitioner's renewal application should then be granted (Tr. 594-595).

Pursuant to petitioner's request, the Commission withheld further processing of petitioner's renewal application pending further inspection of the operation of Station WJBW. However, periodic inspections of the station between Jan-

uary 12, 1944, and January 21, 1946, instead of disclosing operation in compliance with the Commission's Rules and Regulations, resulted in the issuance of 17 additional notices of violations of the Commission's Rules and Regulations and Standards, involving 26 separate violation citations some of which concerned serious breaches of wartime security regulations (R. 216-218, 232-34). Thereafter, the Commission on June 27, 1946, designated petitioner's renewal application for further hearing upon additional issues relating to the technical and financial qualifications of the petitioner to continue operation of the station, the nature and character of the program service rendered and proposed to be rendered by the applicant, and the technical, security, and other violations occurring since the previous hearing (R. 88-92). This hearing was scheduled for October 10, 1946.

On September 20, 1946, Louise C. Carlson, New Orleans, Louisiana, ex-wife of petitioner, filed an application for a construction permit to authorize construction and operation of a new station on the frequency 1230 kilocycles with power of 250 watts at New Orleans, Louisiana, the same assignment requested by petitioner (R. 95-97). On the same date, Mrs. Carlson petitioned for a consolidated hearing on her application and the mutually exclusive application of petitioner (R. 97-100). No opposition to this petition was ever filed by the petitioner. On September 25, 1946,

the Commission granted Mrs. Carlson's unopposed petition and designated the consolidated hearing for October 10, 1946 (R. 101-103). At the request of the petitioner (Tr. 605-606), the consolidated hearing was continued until November 4, 1946 (Tr. 607), and was held on November 4, 5, and 6, 1946, at New Orleans, Louisiana (R. 167).

On May 28, 1947, six months after the hearing record had been closed, petitioner filed an application for a construction permit to change the transmitter location and install a new transmitter and antenna system, and four months later, on September 24, 1947, he filed a petition requesting joint consideration of this application for modification of the existing license of station WJBW and of his application for renewal of the station's license (R. 167-168). The Commission, on October 2, 1947, denied this petition for joint consideration and ordered action on the new application for a construction permit held in abeyance pending final decision of petitioner's application for renewal of license, since action on the new application "is contingent upon whatever action the Commission may take upon the pending renewal application of Charles C. Carlson" (R. 169-171).

On December 3, 1947, the Commission adopted a Proposed Decision, proposing to deny the application of petitioner for renewal of license of Station WJBW and to grant the application of

Louise C. Carlson for a construction permit for the same facilities (Tr. 1267-1302). On December 30, 1947, petitioner filed Exceptions to the Proposed Decision and a Request for Oral Argument (Tr. 1304-1310). The Commission, on February 9, 1948, scheduled the oral argument for February 17, 1948 (Tr. 1329).

On February 10, 1948, petitioner's Washington counsel filed a petition to reopen the record to take further testimony and continue oral argument (R. 171-173). The Commission denied this petition on February 11, 1948 (R. 174-175). Thereupon Mr. Maurice B. Gatlin, petitioner's New Orleans counsel, telegraphed the Commission on February 12, 1948, requesting that oral argument be continued until after March 15, 1948, alleging, for the first time, that he desired to present petitioner's oral argument but could not be present in Washington on the day set for oral argument (R. 175). On February 13, 1948, Louise C. Carlson filed an opposition to the telegraphed petition of Mr. Gatlin (R. 177-183) and the Commission, on February 13, 1948, denied the telegraphic petition for continuance of oral argument (R. 176). Thereafter, on February 16, 1948, one day before oral argument, the firm of Fisher, Wayland, Duvall and Southmayd, which had been representing the petitioner in Washington, notified the Commission, without explanation, that it had withdrawn from the case (R. 184).

On February 17, 1948, Mr. Harry R. Hill, Mr. Gatlin's New Orleans associate, entered an appearance on behalf of the petitioner, (Tr. 1390), and participated in full argument before the Commission. At that time he also renewed his request for continuance of oral argument, which was refused by the Commission (R. 185-189; cf. R. 207-209, fn. 6 a).

Subsequent to the oral argument, petitioner, on March 18, 1949, filed a second petition with the Commission to reopen the case for further hearing (R. 189-201). The petition was denied by the Commission's Order of April 22, 1948 (R. 202-203).

The Commission's final decision, denying petitioner's renewal application and granting a construction permit to Louise C. Carlson, was released April 26, 1948 (R. 204-246). The Commission found that "by reason of the past unsatisfactory operation of Station WJBW and past conduct in failing to comply with the Commission's Rules, Regulations and Standards, the applicant, Charles C. Carlson, has demonstrated his unfitness to continue further in the operation of Station WJBW * * * [and] * * * public interest, convenience and necessity will not be served by a grant of his application for renewal of license * * *" The denial of petitioner's renewal application was explicitly placed upon grounds independent of, and apart from, any consideration of the application of Louise C. Carl-

son and, therefore, the Commission did not give comparative consideration to the two applications (R. 245-246). The Commission found, on the basis of detailed findings of fact and conclusions made on the record of the hearing, that a grant of the application of Louise C. Carlson would be in the public interest (R. 240-242). On May 14, 1948, petitioner filed with the Commission an application for rehearing and stay order (R. 248-270). This was denied by the Commission on July 30, 1948, in a Memorandum Opinion and Order (R. 272-275). On August 19, 1948, the petitioner appealed to the Court of Appeals for the District of Columbia Circuit under the provisions of Section 402 (b) of the Communications Act of 1934, as amended (R. 2-7). On February 14, 1949, after oral argument, the Court of Appeals (Edgerton, Prettyman and Proctor, JJ.) affirmed the Commission in a *per curiam* opinion stating "We find no error in the record. The decision of the Federal Communications Commission is therefore affirmed" (R. 277).

ARGUMENT

In spite of the multiplicity of questions which the petitioner has presented to this Court as reasons for granting a writ of certiorari, it is clear, as the court below found in its summary dismissal of petitioner's appeal, that no substantial issue or question of law is presented which would warrant the consideration of this Court. The attack is upon a decision of the Com-

mission denying an application for renewal of license for petitioner's radio station because the Commission determined that petitioner's record of violations of the Communications Act and the Commission's Rules and Regulations—a record disclosing no less than 118 separate violations over a period of approximately six years—demonstrated conclusively that he lacked the minimum requisite qualifications of a radio station licensee and that a renewal of his license would, therefore, not be in the public interest. This conclusion has ample support in the record and was reached after a full and fair hearing.

1. Neither in the petition for certiorari nor before the court below did petitioner challenge the undisputed authority of the Commission, under the provisions of the Communications Act of 1934, to refuse to renew a license of any person, where the record of his violations of the Act and the Commission's Rules and Regulations reasonably shows that the licensee either is not capable of conforming the operation of his station to the valid statutory and administrative requirements for such operation or is unwilling to do so. See *Greater Kampeska Radio Corp. v. Federal Communications Commission*, 108 F. 2d 5, 71 App. D. C. 117. Petitioner concedes that most of the charged violations occurred (Pet. 17, *supra*, p. 4), and the Commission's detailed findings of facts and conclusions, as well as the full record of the administrative hearing, make plain the

justification for its action in this case. The Commission decided to deny petitioner's application for renewal of license only after it was convinced by two hearings over a period of years that petitioner could not be entrusted with the duties of a licensee. After its first hearing on the matter in 1943 had disclosed a total of 92 separate violations of the Commission's Rules and Regulations, the Commission, at the request of the petitioner, withheld further action for a period of two years in order to determine from further inspections of the station whether the licensee could actually live up to his profession that he would reform his mode of operation and henceforth operate in accordance with the Commission's Rules and Regulations. It was only after these supplementary inspections resulted in some 17 additional notices of violations, involving 26 separate violations some of which concerned serious violations of wartime security regulations, and a further hearing in 1946 had verified the existence of these further violations, that the Commission reached its conclusion that the licensee was not qualified to continue operations as a radio broadcaster. This result, as the Commission's decision makes clear (*e. g.*, R. 211-214, 218, 219, 221, 224-225, 226, 227, 228, 231, 233, 234, 235, 238, 244-245), was arrived at only after full and detailed consideration of such explanations for his failures as the petitioner was able to submit. The reasonableness of the Commission's determination can-

not seriously be challenged; if the Commission cannot determine on the basis of a record such as the present one that continued operation by the licensee would not be in the public interest, then it could not reasonably be expected to secure any substantial compliance with, or enforcement of, its technical rules and regulations or of the Standards of Good Engineering Practice. Mere promises of reform are not sufficient to compel renewal of the license where the record conclusively establishes that previous like promises were not fulfilled, either because of petitioner's inability or his unwillingness to achieve compliance.

2. Petitioner also raises several alleged procedural errors which have no substance and present no significant issue for determination by this Court. Each of these claims was full argued by petitioner in the court below, in brief and oral argument, and was found to be without merit.

a. Principal reliance is placed here, as in the court below, upon the Commission's refusal to grant petitioner's several requests for continuances of oral argument on his exceptions to the Proposed Decision (Pet. 8-11).³ These refusals

³ Petitioner does not allege or suggest that he was deprived of the opportunity of introducing such evidence as he desired at the two extensive hearings, or of the opportunity to file exceptions to the Proposed Decision setting forth the tentative findings and conclusions of the Commission, together with a brief in support of these exceptions, or to request and secure oral argument before the Commission *en banc* before the adoption of any final decision in the matter.

petitioner contends deprived him of his right to a fair and full hearing under Section 309 (a) of the Communications Act, the oral argument provided by Section 409, and the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. It is clear, however, that administrative agencies, like courts, have a wide area of discretion in determining whether or not requests for continuances of judicial or administrative proceedings should be granted, and that reviewing courts will only intervene where it is evident that the agency or court has clearly abused its discretion. *Franklin v. South Carolina*, 218 U. S. 161, 168; *National Labor Relations Board v. American Potash and Chemical Corp.*, 98 F. 2d 488, 492 (C. A. 9); *Mississippi Valley Structural Steel Company v. National Labor Relations Board*, 145 F. 2d 664 (C. A. 8). The facts in the present case, fully set out and considered in the Commission's final Decision (R. 207-209, fn. 6a), clearly justify the Commission's conclusion that adjournment of the oral argument was unwarranted.

b. The insubstantiality of the claim (Pet. 11-13) that the Commission acted improperly in consolidating for joint hearing petitioner's renewal application and the mutually exclusive application of the intervenor (Mrs. Louise C. Carlson) for a construction permit to operate a station on the facilities then assigned to the petitioner is evidenced by the fact that no objection to the

consolidation was ever raised by the petitioner at any time while Mrs. Carlson's petition for consolidation was pending. Instead, petitioner objected to the consolidation for the first time in his petition for reconsideration filed over a year and a half later, after the adoption and issuance of the Commission's final decision (R. 250-253). The Commission's Rules and Regulations in existence at the time Mrs. Carlson requested joint consideration of the two applications (September 1946) expressly provided that an application filed subsequent to the time when a previous application had been designated for hearing, but mutually exclusive with such other application, could be designated to be heard in a consolidated proceeding if the Commission "in its discretion deems such action advisable." (Sec. 1.387 (b) (3) of the Commission's Rules, 11 Fed. Reg. 177-A-417 (1946), Pet. 24); and that the Commission would consolidate for hearing applications presenting conflicting claims of the same nature "where such action will best conduce to the proper dispatch of business and to the ends of justice." (Sec. 1.724 of the Commission's Rules, 11 Fed. Reg. 177-A-425 (1946), Pet. 25.) At the time of Mrs. Carlson's motion for consolidation, petitioner's application for license renewal had already been designated for further hearing in connection with the various violations of the Commission's Rules which had occurred subsequent to the first hearing in November, 1943. *Supra*,

p. 5. Since a hearing on the other mutually exclusive application was already required, it was clearly a reasonable determination on the part of the Commission that a joint hearing of the two applications would aid in the prompt dispatch of the Commission's business.

c. Similarly, there was no error in the Commission's refusal to consolidate petitioner's belated application to install new equipment (and to make other improvements) with the hearing on the applications of petitioner and intervenor for station licenses (Pet. 13-15). Petitioner's application for a construction permit was not even filed until six months after the consolidated hearing record on the two license applications was closed. No request for consolidation was made for an additional four months thereafter. *Supra*,

p. 6. The issue in the license proceeding was not primarily whether petitioner possessed the requisite physical equipment to operate in the public interest, but whether his long history of violations, many of which had nothing to do with the condition of his equipment, was such that the Commission could properly conclude that he did not possess the minimum requisite qualifications of a broadcast licensee, without regard to what equipment he might install in his station. To the extent that the deficiencies in the existing equipment were relevant as an explanation for petitioner's various violations of the Commission's Rules and Regulations and Standards, he

had sufficient opportunity to produce the pertinent evidence in the two extensive hearings on the license application in 1943 and 1946, and, in fact, some such evidence was introduced by the petitioner. But the granting of the application for a construction permit was, as the Commission indicated, necessarily contingent upon whether or not the applicant personally possessed the minimum qualifications of a licensee (R. 170-171). There was, therefore, clear justification for the Commission's determination that action upon the construction application should be held in abeyance pending decision in the basic licensing proceeding.

d. Finally, it is evident that no issue worthy of review is raised by petitioner's claim that the Commission erred in refusing to reopen the record, after the conclusion of oral argument on the Proposed Decision, in order to take evidence with respect to the intervenor's alleged violations of Section 310 (b) of the Communications Act (Pet. 15-16). The Commission denied this request of the petitioner in an order dated April 22, 1948 (R. 202-203) which pointed out that the petition was not in compliance with the Commission's Rules prescribing the procedure for the filing of such motions; that most of the allegedly new evidence was known to the petitioner previously and had been presented to the Commission in the hearings, oral argument and pleadings already filed; and that with respect to the events

alleged to have occurred since the oral argument, the facts set forth pertained solely to disputes as to private interests in the physical assets of station WJBW which arose out of the previous marital status of the competing applicants, were properly the subject of state court adjudication, and were not germane to the present proceeding. The petitioner has at no time made any attempt to show that any of these conclusions upon which the Commission based its denial of the request to reopen the record were improper or incorrect, and the contention presents no substantial issue meriting this Court's attention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

✓ PHILIP B. PERLMAN,
Solicitor General.

✓ BENEDICT P. COTTONE,
General Counsel,
Federal Communications Commission.

MAY 1949

APPENDIX

The Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. 151 *et seq.*) provides in pertinent part:

ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. [47 U. S. C. 307] (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. [47 U. S. C. 309] (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * *